Why Transnational Law Matters

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What is transnational law and why does it matter? Transnational law represents a hybrid of domestic and international law that has assumed increasing significance in our lives. Let me address why transnational law is important, and then turn to some emerging trends, which I call transnational legal process, transnational legal substance, and the rise of transnational public law. I will close by considering ways in which legal education and American law schools should act to keep pace with the ascendancy of transnational law.

In his 1956 Storrs Lectures, Judge Philip Jessup famously defined "transnational law" as "all law which regulates actions or events that transcend national frontiers . . . [including] [b]oth public and private international law . . . [plus] other rules which do not wholly fit into such standard categories."[1] Perhaps the best summary of the extant doctrines of transnational law can be found in the American Law Institute's Restatement (Third) of Foreign Relations Law.[2] One might think of transnational law as law that is neither purely domestic nor purely international, but rather, a hybrid of the two. Consider, for example, the metric system or the Internet business concept of "dot.com." Are these domestic or international concepts? Of course, the intuitive answer is neither. Both are hybrids, purely transnational ideas.

Perhaps the best operational definition of transnational law, using computer-age imagery, is: (1) law that is "downloaded" from international to domestic law: for example, an international law concept

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1. PHILIP C. JESSUP, TRANSNATIONAL LAW 2 (1956).
2. *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987).

that is domesticated or internalized into municipal law, such as the international human rights norm against disappearance, now recognized as domestic law in most municipal systems; (2) law that is "uploaded, then downloaded": for example, a rule that originates in a domestic legal system, such as the guarantee of a free trial under the concept of due process of law in Western legal systems, which then becomes part of international law, as in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, and from there becomes internalized into nearly every legal system in the world; and (3) law that is borrowed or "horizontally transplanted" from one national system to another: for example, the "unclean hands" doctrine, which migrated from the British law of equity to many other legal systems.

Today, the concept of transnational law embraces a range of law school courses thought to be neither purely domestic nor international, neither purely public nor private, for example: Comparative Law, Immigration and Refugee Law, International Business Transactions, International Commercial Law, International Trade Law, Foreign Relations Law, National Security Law, Law of Cyberspace, Law and Development, Environmental Law, and the Law of Transnational Crimes. In each of these legal areas, global standards have become fully recognized, integrated, and internalized into domestic legal systems

To understand how transnational law works, one must understand "Transnational Legal Process": the transubstantive process in each of these issue areas whereby states and other transnational private actors use the blend of domestic and international legal process to internalize international legal norms into domestic law.[3] As I have argued elsewhere, key agents in promoting this process of internalization include transnational norm entrepreneurs, governmental norm sponsors, transnational issue networks, and interpretive communities.[4] In this story, one of these agents triggers an interaction at the international level, works together with other agents of internalization to force an

3. *See generally* Harold Hongju Koh, *The 1994 Roscoe Pound Lecture: Transnational Legal Process*, 75 NEB. L. REV. 181 (1996); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997); OONA HATHAWAY & HAROLD HONGJU KOH, FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS 173-204 (2006).

4. Transnational legal process highlights the interactions among both private citizens, whom I call "transnational norm entrepreneurs," and governmental officials, whom I call "governmental norm sponsors." The interaction among transnational norm entrepreneurs and governmental norm sponsors create transnational networks and law-declaring fora, which create new rules of international law that are construed by interpretive communities. Through the work of these "agents of internalization," these international law rules trickle down from the international level and become domesticated into national law. *See generally* Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998).

interpretation of the international legal norm in an interpretive forum, and then continues to work with those agents to persuade a resisting nation-state to internalize that interpretation into domestic law. Through repeated cycles of "interaction-interpretation-internalization," interpretations of applicable global norms are eventually internalized into states' domestic legal systems.

To illustrate, consider the ancient law of the law merchant ("*lex mercatoria*"). Originally developed as a form of business regulation among merchants in the Mediterranean, English merchants brought the customs, principles, and rules of *lex mercatoria* to England where they became incorporated into the English common law.[5] From there, this body of law migrated to the New World to become part of American common law.[6] Through the enactment of the Uniform Commercial Code, which sought to codify existing mercantile custom, in forty nine states and the District of Columbia, *lex mercatoria* entered state statutory law. It then became treaty law as part of the United Nations Convention on Contracts for International Sale of Goods, which entered into force for the United States on January 1, 1988.[7] Thus, the transnational legal process story of *lex mercatoria* shows that it was domesticated through an historical process whereby it began as transnational custom, mutated into domestic common law, was transplanted to another national system, was codified into domestic statutory law, and finally was uploaded into international treaty law, which is also federal law in the United States.

Transnational law matters because it increasingly influences laws and policies that govern us, particularly when international law and policies become domesticated into U.S. law and policies. Take, for example, the recent, intense public debate over the domestication of the international norm against torture. The Bush Administration has battled over whether or not the norm against torture has in fact been internalized into executive practice, but President Bush has recently conceded that, as a matter of executive branch policy, the President cannot in fact order torture.[8] On the legislative side, the McCain Amendment to the most

5. *See* Harold J. Berman & Colin Kaufman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 19 HARV. INT'L L.J. 221, 224-29 (1978).

6. *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) (clarifying that the bill of exchange rules derived from *lex mercatoria* constituted part of the "general common law" to be interpreted by federal courts sitting in diversity jurisdiction).

7. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG]. By operation of the Supremacy Clause, the CISG overrides the UCC with respect to contracts for the sale of goods between parties whose places of business are in different contracting states.

8. In January 2006, President Bush stated unambiguously: "I don't think a president can . . . order torture, for example. . . . Yes, there are clear red lines. . . ." Interview by Bob Schieffer, CBS News, with President George W. Bush, in Washington, D.C. (Jan. 27, 2006), *available at* http://www.cbsnews.com/stories/2006/01/27/eveningnews/

recent Department of Defense Authorization Act explicitly internalized the norm against torture.[9] Moreover, since 1980, the federal courts of the United States have held that torture constitutes a tort in violation of the law of nations.[10] Notwithstanding these varied efforts, at this writing, a controversy still reigns over whether and to what extent the United States government has genuinely foresworn the use of torture as an interrogation device in the war on terror.

A similar controversy rages over the permissible uses of international law in interpreting domestic law. Over the decades, American judges have helped to internalize international legal norms into U.S. domestic law through a range of interpretive techniques, including: (1) constitutional interpretation,[11] (2) treaty interpretation,[12] (3) incorporation of customary international law into domestic law, (4) direct statutory interpretation of statutes that expressly incorporate international law, (5) indirect statutory interpretation in accordance with the so-called "*Charming Betsy*" canon, which requires courts to construe ambiguous federal statutes to comport with governing rules of international law,[13] and finally (6) by interpreting state law in light of rules of international law. Through these varied interpretive techniques, federal judges have become an increasingly critical link between the

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main1248952_page3.shtml. For a review of the effort to internalize the norm against torture into U.S. law, *see* Harold Hongju Koh, *"Can the President Be Torturer in Chief?"* 81 IND. L.J. 1145 (2005).

9. National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-148, Div. A, tit. X, § 1003, 119 Stat. 2680, 2739-40 (2005) ("No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment."). The previous Defense Authorization Act stated that "[i]t is the policy of the United States to—(1) ensure that no detainee shall be subject to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States." Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1091(b)(1), 118 Stat. 1811, 2068 (2004).

10. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

11. *See, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005) (referencing international norms and practices in holding unconstitutional executions of offenders who were under the age of eighteen when their crime was committed); Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (discussing status of customary international law as federal common law); Olympic Airways v. Husain, 540 U.S. 644 (2004) (interpreting the Warsaw Convention); Lawrence v. Texas, 539 U.S. 558 (2003) (referencing international norms and practices in holding unconstitutional the criminalization of consensual, adult, private, same-sex sodomy); Atkins v. Virginia, 536 U.S. 304 (2002) (referencing international norms and practices in holding unconstitutional executions of mentally retarded offenders).

12. *See, e.g.*, Olympic Airways v. Husain, 540 U.S. 644 (2004); Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, 126 S. Ct. 1211 (2006).

13. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 84, 118 (1804) ("An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.").

international and the domestic legal spheres. During the last several terms, the Court has heard more cases involving transnational legal issues than ever before, reflecting the growing globalization of our national activities.[14]

When addressing these issues, as I have noted elsewhere, the Supreme Court has now divided into transnationalist and nationalist factions, which hold sharply divergent attitudes toward transnational law.[15] The transnationalist faction—which includes Justices Breyer, Souter, Stevens, Ginsburg, and at times, Justice Kennedy—tends to follow an approach suggested by Justice Blackmun in the late 1980s: that U.S. courts must look beyond national interest to the "mutual interests of all nations in a smoothly functioning international legal regime" and must "consider if there is a course that furthers, rather than impedes, the development of an ordered international system."[16] In contrast, another group of Justices, which includes the new Chief Justice John Roberts and Justices Scalia, Thomas, and Alito,[17] seems committed to a more nationalist course.

Generally speaking, the transnationalists tend to emphasize the interdependence between the United States and the rest of the world, while the nationalists tend instead to focus more on preserving American autonomy. The transnationalists believe in and promote the blending of international and domestic law; while nationalists continue to maintain a rigid separation of domestic from foreign law. The transnationalists view domestic courts as having a critical role to play in domesticating international law into U.S. law, while nationalists argue instead that only the political branches can internalize international law. The transnationalists believe that U.S. courts can and should use their interpretive powers to promote the development of a global legal system, while the nationalists tend to claim that U.S. courts should limit their attention to the development of a national system. Finally, the transnationalists urge that the power of the executive branch should be constrained by judicial review and the concept of international comity,

14. *See* cases cited in Koh, Hager Lecture, *supra* note *, at 3-4, from which this discussion is drawn.

15. *Id.* at 5-6.

16. Société Nationale Industrielle Aérospatiale v. U. S. Dist. Ct., 482 U.S. 522, 555, 567 (1987) (Blackmun, J., concurring in part).

17. In their recent nomination hearings, both Chief Justice Roberts and Justice Alito were asked several questions about the application of international and foreign law to U.S. law, and both suggested that they were clearly in the nationalist camp. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong. 370 (2005); *Confirmation Hearing on Samuel Alito To Be Associate Justice of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong. 370 (2006).

while the nationalists tend to believe that federal courts should give extraordinarily broad deference to executive power in foreign affairs.

Why does this difference in judicial philosophies matter? First, because the transnationalist/nationalist debate is gaining public visibility; witness, for example, the recent debate between Justices Breyer and Scalia on the topic at American University.[18] Second, this increasingly visible public debate not only explains much of the ongoing struggle in particular transnational cases, but also seems likely to decide the U.S. courts' future orientation toward the phenomenon of globalization as it presents itself in a wider range of cases. Third, this is an issue that crosses partisan political lines. Notably, three of the transnationalists—Justices Stevens, Souter, and Kennedy—are Republican appointees. With Justices Roberts and Alito now seemingly poised to join the nationalist camp, the transnationalist-nationalist split increasingly hinges on Justice Kennedy's pivotal vote, with the next Supreme Court appointment *after* Justice Alito most likely to determine the Court's future course on these issues. Yet oddly, although any newly appointed Justices will play this pivotal role with respect to law and globalization, both the Roberts and Alito confirmation hearings were unusually weighted toward the new Justices' potential impact on "yesterday's issues"—federalism and social issues, such as abortion, gay rights, religion, and affirmative action—rather than on tomorrow's issues, particularly the role of U.S. law and courts in a global era of technology and innovation.

And what do these changes in evolving American law portend for American legal education? As I have argued elsewhere, if transnational law will loom so large in our future, we need to teach our students more transnational law, not just transnational legal process but also what I call "Transnational Legal Substance."[19] We know about the transnational private law that has emerged in a variety of areas, such as the new *lex mercatoria*, international finance, international banking law, and the law of cyberspace. But the most visible trend in transnational substantive law has been the emergence of what I call "transnational public law." In the same way as the focus of the twentieth century law school gradually shifted from the teaching of private law toward the teaching of public law, the major change in the twenty-first century will similarly be toward such topics in transnational public law as the law of global democracy,

18. *See* Justice Stephen Breyer & Justice Antonin Scalia, Discussion on Constitutional Relevance of Foreign Court Decisions (Jan. 13, 2005) (transcript available at http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument).

19. *See* Harold Hongju Koh, *The Globalization of Freedom*, 26 YALE J. INT'L L. 305 (2001).

the law of global governance, the law of transnational crime, the law of transnational injury and redress, the law of regulation of transnational markets, and the law of transnational dispute resolution, to name just a few topics.

To address these global trends, American law schools will need to reform their traditional legal curriculum, their faculties and their scholarship, their students, and other aspects of legal education. Some schools have addressed curricular change by requiring international or transnational law courses, but at Yale Law School, our approach has been to mainstream a focus on globalization into our traditional First Term Curriculum, adding international modules in the basic courses of Procedure, Torts, Constitutional Law, and Contracts.

In rethinking the first year law school curriculum, one could imagine a course in contract that includes, alongside traditional domestic doctrine, a discussion of *Transnational Contracts*: for example, oil development agreements between multinational oil companies and developing nations, governed by the U.N. Convention on Contracts for the International Sale of Goods.[20] The torts course could add a discussion of *Transnational Torts,* both mass disasters such as the Bhopal tragedy and civil litigation of crimes against humanity and "torts in violation of the law of nations" under the Alien Tort Claims Act.[21] The basic criminal law course could be modified to include a module on such *Transnational Crimes* as terrorism, drug trafficking, trafficking in persons, and international criminal litigation in domestic courts, such as the *Lockerbie* or *Pinochet* cases. In my own basic first-term course in Procedure, I teach several weeks on topics in *Transnational Procedure,* including transnational public law litigation[22] and the ALI/UNIDROIT Principles and Rules of Transnational Rules of Civil Procedure, which represent cross-cutting transnational procedural rules on jurisdiction, venue, service of process, the taking of evidence, and the recognition of judgments.[23] Similarly, property courses could include modules on *Transnational Property*—for example, the World Trade Organization (WTO) rules on protection of intellectual property—and there is already a rich body of teaching materials on *Comparative Constitutional Law.*[24]

At the upper levels, we also now recommend that most of our

20. *See* CISG, *supra* note 7.

21. 28 U.S.C. § 1350; *see also* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (stating test for what kinds of torts are actionable under this statute).

22. *See* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991).

23. American Law Institute & UNIDROIT, Principles and Rules of Transnational Civil Procedure (2005).

24. *See generally* VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW (1999).

students take a First-Year, Second-Term course in Transnational Law, to shift the students' minds from the largely domestic first-year curriculum into a transnational mindset. A more comprehensive advanced transnational law curriculum would include additional transnational courses and seminars that deal with current topics of student and faculty interest, clinical courses that prepare students for global legal practice, and the broader objective of enhancing the global awareness of our students by requiring more entering J.D. students to have foreign language fluency or overseas travel experience as qualifications for admission.

We should not overlook the need to globalize other aspects of our law school agenda as well: particularly faculty, scholarship and other law school programs. Our faculties can be diversified by increasing the numbers of foreign visiting professors, programs of faculty and student exchanges, expanded programs on regional law (in Latin America, the Middle East, China, and South Asia), and more career services to prepare students for global practice. We might also create international concentrations in our graduate programs, such as on foreign tax and international human rights, and emphasize the importance of cross-disciplinary, transnational scholarship. Our larger goal is to promote the building of worldwide networks of graduates—J.D.s, LL.M.s, as well as J.S.D. graduates who return to teach and practice in their home countries—with the eventual goal of using those human networks to move toward deeper partnerships and perhaps even joint degree programs with leading foreign law schools.

Finally, information networks are a critical part of the global future. In our library at Yale, for example, we are increasingly focusing on shared global library databases with common portals on the World Wide Web, such as our online human rights archive (the Diana Project).[25] Similarly, our Schell Center for Human Rights[26] has also joined in a partnership with several other institutions to create the Artemis Project for Truth Commission Testimonies,[27] which is designed to create a unified database where researchers can find cross-cultural data regarding the several dozen truth and reconciliation commissions that have been conducted around the world.

There is much more that can be said, but it should be obvious by

25. *See* Project Diana, http://www.yale.edu/lawweb/avalon/diana/ (last visited Dec. 4, 2006).

26. *See* Orville H. Schell, Jr. Center for International Human Rights, http://www.law.yale.edu/intellectuallife/abouttheschellcenter.htm (last visited Dec. 4, 2006).

27. *See* Artemis Project for Truth Commission Testimonies, http://www.law.yale.edu/trc/artemis.htm (last visited Dec. 4, 2006).

now that transnational law clearly matters. Transnational law represents a kind of hybrid between domestic and international law that can be downloaded, uploaded, or transplanted from one national system to another. Transnational law is becoming increasingly important because it increasingly governs and influences our lives, particularly during an increasingly contentious war on terror. Not only does transnational law already represent a growing part of the Supreme Court's docket, but in a new millennium, the study of transnational law will soon also affect and be reflected in all aspects of our legal education.